

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Stephen Drelick, and
Drelick Holdings, LLC

v.

Civil No. 08-cv-112-JL
Opinion No. 2008 DNH 118

Innovative Development Company,
LLC, John Powers Associates, Inc.
John Powers, and Ryan Byther

MEMORANDUM AND ORDER

The plaintiffs, Stephen Drelick and his company Drelick Holdings, LLC, brought an action in New Hampshire state court against the defendants, a mortgage brokerage firm and its principals, alleging the unlawful refusal to disburse over \$122,000 in loan proceeds. The defendants removed the action to this court, see 28 U.S.C. § 1441, invoking its diversity jurisdiction. Id. § 1332(a). The plaintiffs have responded with a motion to: (1) amend the complaint to join additional non-diverse defendants, and (2) remand the action to the state court based on the resulting lack of diversity jurisdiction. After a hearing, and for the reasons that follow, the plaintiffs' motions to amend and to remand are denied.

I. BACKGROUND¹

In 2005, the plaintiffs, Stephen Drelick and Drelick Holdings, LLC (collectively "Drelick"), both residents of New Hampshire, obtained a \$3.2 million loan from UPS Capital Business Credit to finance the construction of the Rockingham Athletic Club in Plaistow. Drelick hired John Powers and John Powers Associates, Inc., Maine residents, to do the architectural work, and Shawn Meuse and Advanced Design and Construction, New Hampshire residents, as his general contractor.

After financial difficulties stalled the construction project, Drelick retained Alpine Mortgage and began working with one of its agents, Ryan Byther, a resident of Maine, to secure additional financing. Soon thereafter, Byther left Alpine Mortgage to form a new mortgage brokerage firm, Innovative Development Company, LLC--a named defendant and resident of Maine²--with Powers and Meuse. With the assistance of Byther and

¹ The background information is taken from the plaintiff's complaint and the parties' pleadings.

² For purposes of diversity jurisdiction, the citizenship of a limited liability company is determined by the citizenship of its individual members. See Pramco, LLC v. San Juan Bay Marina, Inc., 435 F.3d 51, 54 (1st Cir. 2006). Byther and Powers, the members of the LLC, are both residents of Maine.

Innovative Development,³ Drelick obtained a \$589,000 loan commitment ("the second loan") from UPS Capital to complete construction of the project.

On December 28, 2007, Drelick closed on the second loan and turned over the loan proceeds to Innovative Development to cover a variety of construction costs and outstanding debts. Several months later Byther presented Drelick with a proposed schedule which outlined how he intended to disburse the money. Upon review of the schedule, Drelick discovered \$122,231.55 in proposed payments that he had not approved--including a \$25,000 payment to Meuse and Advanced Design for construction work. Drelick notified the defendants of these disputed payments, but they nonetheless sent him a check for \$17,314.88, representing the balance of the second loan after all of the proposed payments, including those in dispute, had been made.

On March 14, 2008, Drelick filed suit against the defendants--Innovative Development, John Powers Associates, John Powers, and Ryan Byther--in Rockingham County Superior Court, seeking damages in the amount of the disputed payments and injunctive relief. Less than two weeks later, on the morning of

³ In addition to assisting Drelick obtain secondary financing, the defendants made a series of loans to Drelick to allow him to stay current on the primary loan.

the state court injunction hearing, defense counsel called counsel for Drelick and notified him of their intent to remove the case to federal court. In response, Drelick's counsel stated his intent to join two residents of New Hampshire, Shawn Meuse and Advanced Design, thereby eliminating the basis for diversity jurisdiction under 28 U.S.C. § 1332. After their conversation, defendants removed the case to federal court. Two days after removal, Drelick moved: (1) to amend the complaint to add Shawn Meuse and Advanced Design as additional non-diverse defendants, and (2) to remand the case to state court on the ground that there was no longer complete diversity of citizenship.

II. APPLICABLE LEGAL STANDARD

A single statute governs both issues before the court. As part of the Judicial Improvements and Access to Justice Act of 1998, Congress enacted 28 U.S.C. § 1447(e), which provides:

If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to State court.⁴

⁴ Section 1447(e) supersedes Federal Rule of Civil Procedure 15, which specifically allows a plaintiff to "amend its pleading once as a matter of course at any time before a response pleading is served." Fed. R. Civ. P. 15; see also Mayes v. Rapoport, 198 F.3d 457, 462 n.11 (4th Cir. 1999); Doe v. Soc'y for Creative Anachronism, Inc., Nos. 1439-1440, 2007 WL 2155553,

Section 1447(e) grants courts the discretion to determine whether or not to permit joinder of non-diverse defendants. See Casas Office Machs. v. Mita Copystar Am., 42 F.3d 668, 674-75 (1st Cir. 1994); Kelley v. Vt. Mut. Ins. Co., 407 F. Supp. 2d 301, 305 (D. Mass. 2005) (observing that the permissive language of § 1447(e) "makes clear that Congress granted the courts broad discretionary power"); see also Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987). The court's discretion is not restricted by the status of the party to be joined as "indispensable" or "necessary," see Casas, 42 F.3d at 673-75,⁵ but is instead guided by a variety of "equitable factors that depend upon the circumstances." Schrepfer v. Framatome Connectors USA, Inc., 115 F. Supp. 2d 182, 186 (D.N.H. 1999).

at *3 (E.D. Pa. July 25, 2007). Therefore, the plaintiff "may not rely on Rule 15(a) to amend the pleading without leave of court and such an amendment must be analyzed pursuant to § 1447(e)." See Schindler v. Charles Schwab & Co., No. 05-0082, 2005 WL 1155862, at *2 (E.D. La. May 12, 2005).

⁵ See also Irizarry v. Marine Powers Int'l, 153 F.R.D. 12, 14 (D.P.R. 1994) ("Virtually every court confronted with this issue has unanimously agreed that the statute compels a court to focus on whether joinder would be 'equitable' instead of being based on whether a party is indispensable."); Fed. R. Civ. P. 19 (required joinder of necessary parties); 14C Charles Alan Wright, et al., Federal Practice and Procedure § 3739, at 445 (3d ed. 1998) ("Section 1447(e) gives the court more flexibility than a strict Rule 19 analysis").

While the categorization of a party as indispensable "does not affect the Court's weighing of the equities," Maille v. United States Postal Serv., Inc., No. 08-cv-66-GZS, 2008 WL 2164566, at *1 (D. Me. May 21, 2008), it does affect the court's options on disposition of the motion. Where the party proposed to be added is indispensable, the court may deny joinder and dismiss the case, see Fed. R. Civ. P. 19, or allow joinder and remand the case to the state court. See Casas, 42 F.3d at 675. If the party is dispensable, however, the court may either deny joinder and retain jurisdiction over the case, or permit joinder and remand the case to state court. Id. The court cannot both allow joinder of a non-diverse party and retain jurisdiction. Id.

Where a plaintiff seeks to join a non-diverse party after removal on the basis of diversity jurisdiction, the court "should scrutinize that amendment more closely than an ordinary amendment" in order "to balance the defendant's interest in maintaining the federal forum with the competing interests in not having parallel lawsuits." Hensgens, 833 F.2d at 1182. When balancing the equities of a proposed joinder, courts consider a number of factors, including "the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether

plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities." Id. (cited with approval in Casas, 42 F.3d at 675 n.8).

III. ANALYSIS

Here, Drelick argues that these factors weigh in favor of the amendment, and specifically that his motive is not to destroy diversity, but to join Meuse as an associate of Byther and Powers at Innovative Development whose involvement renders him similarly culpable. Moreover, at oral argument, Drelick asserted that under Righetti v. Shell Oil Co. his motive is irrelevant to the joinder analysis so long as he is able to state a bona fide claim against the non-diverse defendant. See 711 F.Supp. 531 (N.D. Cal. 1989). Finally, Drelick argues that he cannot obtain adequate relief without the joinder as Meuse and Advanced Design possess \$25,000 in unauthorized payments made by Innovative Development. The defendants counter that Drelick is merely trying to divest the court of its jurisdiction by adding non-diverse defendants who, if they were as integral to the case as Drelick now suggests, would have been named in the original state court complaint. They argue that "[t]he very quick filing of the motion to amend following the Defendants' removal of this action to federal court confirms this conclusion."

The record before the court suggests that the defendants are correct; Drelick appears to be partially, and likely primarily, motivated by a desire to divest the court of jurisdiction by destroying diversity. Drelick's state court complaint repeatedly refers to Meuse and Advanced Design and discusses the extent of their involvement with Innovative Development over a number of years,⁶ yet fails to name either party as a defendant. Nowhere in the pleadings in support of his motion has Drelick provided a persuasive explanation for the failure to sue Meuse and Advanced Design in state court, explained what changed circumstance makes joinder necessary, or pointed to a unique state procedure or remedy necessary to protect their interests against Meuse and Advanced Design.⁷ Indeed, Drelick's proposed amended complaint is factually identical to, and alleges no conduct occurring subsequent to the filing of, the earlier state court writ.

Instead, Drelick describes at length the extent of Advanced Design and Meuse's entanglement with Innovative Development,

⁶ In the state court complaint, Shawn Meuse and Advanced Design are specifically referred to by Drelick at least twelve times, and Meuse's involvement in the underlying facts of the case is described throughout.

⁷ Drelick's counsel explained at the hearing that these parties were not named in the original complaint through inadvertence resulting from the "time pressure to get into court as quickly as possible to get an injunction."

stating they were "integrally involved in the transactions and events giving rise to Plaintiffs' claims" and that Meuse "was directly involved in the operation of Defendant IDC." Even if accurate, these assertions fail to convince the court that the primary purpose of the amendment is other than to destroy the court's diversity jurisdiction. See Schindler v. Charles Schwab & Co., Inc., No. 05-0082, 2005 WL 1155862, at *2 (E.D. La. May 12, 2005) (where plaintiffs "knew of a non-diverse defendant's identify and activities suggests that the purpose of the amendment is to destroy diversity jurisdiction"). In fact, from the sequence of events established at the hearing on the motion, Drelick was prepared to go forward on the injunction hearing in state court on March 27, 2008, the day after the defendants removed, without Meuse or Advanced Design--parties he now claims are necessary for him to obtain adequate relief.

Nor is the court persuaded by Drelick's argument that Righetti stands for the legal proposition that motive (in seeking the proposed amendment) is irrelevant where he has stated a bona fide claim against Meuse and ADC. To the contrary, the same court that decided Righetti nearly twenty years ago, has repeatedly rejected this position, recently stating--in a case where the plaintiff stated a legitimate claim against the defendant he sought to join--that "the motive of a plaintiff in

seeking the joinder of an additional defendant is relevant to a trial court's decision to grant the plaintiff leave to amend his original complaint." Walsh v. Home Depot U.S.A., Inc., No. C-06-4207, 2006 WL 2884411, at *4 (N.D. Cal. Oct. 10, 2006) (emphasis added); see also Gunn v. Wild, No. C-01-4320, 2002 WL 356642, at *3 (N.D. Cal. Feb. 26, 2002) (treating the validity of the claim as one of six factors to be considered, in addition to motive, when analyzing a proposed joinder).

As for whether Drelick has been dilatory in seeking the amendment, he moved to join the non-diverse parties shortly after defendants removed to federal court. See Rapoport, 198 F.3d at 463 (noting that courts carefully scrutinize attempts to add a non-diverse defendant after removal). While the diligence with which Drelick sought this amendment could weigh in favor of joinder, that factor cuts both ways in the context of a post removal request. Compare Hensgens, 833 F.2d at 1182 (dilatory tactics in seeking amendment weigh in favor of allowing joinder), with Rapoport, 198 F.3d at 463 (careful scrutiny of amendment sought immediately after removal) and Sutton v. Hollywood Entm't Corp., 181 F. Supp. 2d 504, 508 (D. Md. 2002) (relevant time period is that which elapses between removal and the proposed amendment, not the filing of the complaint and the amendment).

Denial of the amendment will have little or no prejudicial effect on Drelick's claims, as they can be pursued against Meuse and Advanced Design in state court. Indeed, as Stephen Drelick, Drelick Holdings, and the parties they seek to join are all residents of New Hampshire, and their dispute involves claims grounded in state law, the New Hampshire Superior Court is ideally suited to adjudicate their dispute. In any event, should Drelick desire to pursue the claims against these defendants that he neglected to include in his state court writ of summons, he will have "an opportunity to bring [his] claims against the individual defendants in state court, [and] denying [his] motion to join them in this action would not cause [him] significant injury." Schrepfer, 115 F. Supp. 2d at 187.

IV. CONCLUSION

After considering the equitable factors relating to the proposed joinder, Drelick's motion to join Shawn Meuse and Advanced Design as defendants is denied without prejudice to the filing of any future dispositive motions. As Drelick concedes that the non-diverse defendants are not indispensable within the meaning of Rule 19, the court shall retain jurisdiction and Drelick may proceed with his claims against the already named

defendants in this court. Therefore, Drelick's motion to remand the case to state court is also denied.

SO ORDERED.



Joseph N. Laplante
United States District Judge

Date: June 13, 2008

cc: Christopher H.M. Carter, Esq.
Daniel Miville Deschenes, Esq.
David A. Anderson, Esq.